

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAY -9 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0015-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MANUEL JESUS CORDOVA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051503

Honorable Barbara Sattler, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Frank P. Leto

Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Indicted for first-degree murder, petitioner Manuel Jesus Cordova pled guilty to manslaughter, a dangerous-nature, class two felony. The plea agreement contained a special sentencing provision that called for Cordova to serve between thirteen and twenty-

one years in prison. The trial court imposed a partially aggravated sentence of seventeen years.

¶2 In a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., Cordova challenged his sentence as excessive. He claimed the trial court had given insufficient consideration and weight to the mitigating factors of his youth and immaturity while “double count[ing]” his gang involvement as an aggravator. The present petition for review follows the trial court’s denial of relief, a ruling we would disturb only for a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶3 At his change-of-plea hearing, Cordova agreed with counsel’s statement of the following factual basis for his plea: Cordova and the victim fought at a shopping mall; Cordova stabbed the victim several times with a knife, and the victim died. At the time of the incident in April 2005, Cordova was eighteen years old; the victim was nineteen. According to defense counsel at sentencing, the two young men were “long time acquaintances and rivals” who belonged to different street gangs.

¶4 In deciding to impose a partially aggravated sentence, the trial court found both aggravating and mitigating factors existed but concluded the former outweighed the latter. The mitigating factors it found included Cordova’s age, his family and community support among “a series of people who care about him and think he’s a good person,” and his lack of a significant criminal history. In aggravation, the court found the devastating

effect the murder had had on the victim's family; the nature of the offense itself and Cordova's having stabbed the victim multiple times; the fact that the murder was gang-related; and the fact that it occurred at a shopping mall, that the mall had to be evacuated as a result, and that many people's view of the mall as a place they could safely take their families had likely been altered.

¶5 In his petition for post-conviction relief below, Cordova claimed the court had not given sufficient consideration or weight to his age and immaturity. He argued:

His immaturity led him to associate with the wrong individuals and live the wrong kind of lifestyle. As [trial] counsel pointed out and the circumstances showed, both parties were urged to fight by their friends and [Cordova] was given a knife by one of his so-called "friends." . . . Nothing shows immaturity and poor judgment more than succumbing to the pressure of one's peers when the mature thing to do would be to walk away from trouble.

In denying relief, the trial court rejected this claim, noting it had expressly found Cordova's age to be a mitigating factor. The court appears to have considered Cordova's immaturity—easily inferred from his age and his actions. By rejecting his post-conviction claim, the trial court implicitly ruled that it had already fully considered Cordova's age and immaturity when it sentenced him initially and had given those factors the weight to which it believed they were entitled. *See State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996) ("How much weight should be given proffered mitigating factors is a matter within the sound discretion of the sentencing judge.").

¶6 Cordova’s second contention was that the trial court had improperly relied on the gang-related nature of the offense as an aggravating factor at sentencing. Because the presumptive sentence for manslaughter would otherwise have been 10.5 years, Cordova claimed, “the gang enhancement allegation” had already been factored into the minimum, thirteen-year sentence called for by the plea agreement and should not be weighed again in aggravation.

¶7 In its minute entry denying relief, the trial court rejected Cordova’s claim that the sentencing range provided in the plea agreement already reflected a “gang enhancement.”¹ The court noted that nothing in the plea agreement itself supported that assertion and that the state’s dismissal of all other “charges and allegations” in return for Cordova’s guilty plea presumably encompassed the allegation in the indictment that Cordova had committed the offense in furtherance of gang activity. The court declined to ascribe the plea agreement’s call for a minimum thirteen-year sentence to anything other than the state’s desire to insure Cordova served a lengthy sentence in return for dismissing the first-degree murder charge against him and allowing him to plead guilty instead to manslaughter.

¹Defense counsel had advanced essentially the same argument at the sentencing hearing, urging the trial court to impose the thirteen-year minimum sentence because, counsel claimed, it “took into account the gang enhancement the State was going to seek on this case.”

¶8 Although finding nothing inappropriate in its having considered Cordova’s gang affiliation as an aggravating factor, the trial court nonetheless revisited all the aggravating and mitigating evidence presented to the court at sentencing. In the alternative, it concluded, even had it improperly considered “gang evidence as an aggravator,” such an error would have been harmless in any event because the court believed the remaining aggravating factors still warranted the partially aggravated sentence it had initially imposed. Even without the allegedly improper factor, the court determined, it still would have sentenced Cordova to seventeen years in prison. *Cf. State v. Ojeda*, 159 Ariz. 560, 561, 769 P.2d 1006, 1007 (1989) (“[I]f the judge relies on inappropriate factors and it is unclear whether the judge would have imposed the same sentence absent the inappropriate factors, the case must be remanded for resentencing.”).

¶9 We find no abuse of the trial court’s discretion in denying the petition for post-conviction relief. Although we grant the petition for review, we likewise deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge